

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No. 5321/Mum/2018 (AY : 2015-16)

M/s Kiran Promoters & Developers, C/o Thar & Co 203, Capri Bldg, Opposite HDIL Towers, Anant Kanekar Marg, Bandra (E) Mumbai- 400 051 PAN : AAEFK1475F	Vs	Dy.CIT, Cent.Cir.5(4), Room No. 1927, 19 th Floor, Air India Building, Nariman Point, Mumbai-400021
APPELLANT		RESPONDEDNT

Appellant by	None
Respondent by	Shri Akhtar H Ansari Sr DR
Date of hearing	28-11-2019
Date of pronouncement	06-01-2020

O R D E R

PER PAWAN SINGH, JUDICIAL MEMBER :

1. This appeal by assessee is directed against the order of learned Commissioner of Income Tax {ld. CIT(A)}-53, Mumbai dated 04-06-2018 which arises from assessment order dated 28-09-2017 passed under section (u/s) 143(3) of Income-tax Act, 1961(Act).
2. Brief facts of the case are that the assessee is a builder and developer. While filing return of income for assessment year under consideration, the assessee has declared Nil income. The case was selected for scrutiny. During the assessment, the assessing officer (AO) called certain information with regard to unsold unit before him, worked out the annual rental value of unsold stock / one unit for 8 months at Rs. 64,000/- and

after granting deduction u/s 24 @ 30%, treated the remaining amount of Rs.44,800/- as "Income from house property. On appeal before CIT(A), the action of AO was affirmed. The ld. CIT(A) affirmed the action of AO by relying upon the decision of Hon'ble Delhi High Court in Housing Finance & Leasing 354 ITR 180 (Delhi). Thus, further aggrieved by the order of CIT(A), the assessee filed the present appeal.

3. The assessee has raised the following grounds of appeal:-

"Grounds of appeal against the Appellant Order & Grounds of Decision dated 04/06/2018 passed by the Hon'ble Commissioner of Income Tax (Appeals) - 53, Mumbai.

Following grounds of appeal are without prejudice to each other:

1. a. The Learned CIT (A) has erred in law & on facts in upholding the Learned AO's action of making addition of deemed rental income (Rs.64,000/-)/ALV being rent of Rs.8000/- pm for 8 months in relation to unsold closing stock being one unsold residential unit at Dheeraj Kiran Flat which were lying unsold at the beginning of the year & sold in December 2014 and taxed the same under the head "Income from House Property", which is bad in law.

b. The Learned CIT (A) has erred in law & on facts in relying on the decision of Hon'ble Delhi high Court in the case of Ansal Housing & Leasing Co Ltd. 354 ITR 180 (Del).

2. a. The Learned CIT (A) erred has erred in law & on facts in upholding imposition of interest under section 234B of the Act in the Assessment Order dated 28/09/2017 passed by the Ld AO u/s. 143 (3) of the Income Tax Act, 1961, which is bad in law. b. The Learned CIT (A) has erred in law & on facts in relying on the decision of CIT v/s Bhagat Construction Co. Pvt. Ltd. dated 06.08.2015."

4. None appeared on behalf of the assessee despite service of notice of hearing through RPAD. Although, the written submission on behalf of

assessee is already on record. Perusal of record reveals that Thar & Co CA sought adjournment on 7th November 2019 and the appeal was adjourn for 28.11.2019 i.e today. Therefore, we are left with no option, but to hear the submissions of ld. DR for the revenue and dispose of the appeal on the basis of material available on record.

5. The ld. DR heavily relied upon the orders of authorities below. The ld DR for the revenue further submits that that the legislature has already brought the amendment in section 23 by inserting sub-section (5) of the Act and that the assessee is allowed one year vacancy period from the end of financial year in which the completion certificate is obtained from the competent authority.
6. On the other hand the assessee in its written submissions has submitted that the assessee is business of real estate. During the relevant period under consideration the assessee has one flat admeasuring 540 Sq Feet, in its opening stock, which remained vacant for part of the year and ultimately sold during the year. It is further contended in the submissions that Hon'ble Gujarat High Court in case of CIT Vs Neha Builder (2008 ITR 661) has taken a view that, if the property is used as stock in trade, then said property would become or partake the character of stock and any income derived from such stock would be 'business income' and not

‘income from house property’. The assessee has also relied on the following decisions;

- Housing Development and Infrastructure Vs DCIT (ITA 5986/Mum/2017),
- Mayank Chemiplast Pvt Ltd (ITA No. 4072/Mum/2011),
- C.R. Developers Pvt Ltd Vs JCIT (ITA No. 4277/Mum/2012),
- Runawal construction Vs ACIT (ITA No. 5408/Mum/2016) and
- Chennai Property & Investment Ltd Vs CIT (2015) 373 ITR 673(SC).

7. We have considered the submission of ld. DR and perused the material available on record. There is no dispute that assessee is a builder and developer. During the assessment, the AO treated the Annual Letting Value (ALV) of unsold unit and on the basis of ALV so computed and granting 30% deduction under section 24, brought the income of such units under the head “Income from house property”. The Ld. CIT (A) confirmed the action of AO by making reliance on the decision of Hon’ble Delhi High Court in Housing Finance & Leasing (supra).
8. There is no dispute that the assessee is in the business of real estate. Further, there is no dispute that the assessee has shown one unit of 540 Sq Feet in its stock in trade, which was ultimately sold during the year. The unit was sold during the relevant period is ascertainable from the facts the AO worked out the ALV of this unit only for 8 months. The ld CIT(A) affirmed the action of AO by relying on the decision of Delhi High Court in Ansal Housing & Finance Ltd (supra).

9. The Hon'ble Delhi High Court in CIT Vs Ansal Housing Finance Ltd (supra) has taken a view that ALV of unsold flat built by the builder is assessable as income from the house property. However, there is contrary view of Hon'ble Gujarat High Court in Neha Builders (supra) that income derived from the property would always be termed as 'income' from the property, but if the property is used as 'stock in trade', then said property would become or partake the character of the stock, and income derived from the stock, would be 'income' from the business, and not from the property. If the business of the assessee is to construct the property and to sell it or to construct and let out the same, then would be the 'business' and the business stocks, may included moveable or immoveable, would be taken to be 'stock in trade' and any income from such stock cannot be termed as 'income from property'. There is no direct decision on this issue by Jurisdictional High Court; therefore, the considering the decision of Hon'ble Apex Court in CIT Vs Vegetable product Ltd. (88 ITR 192 SC) that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. Thus, we are accepting the view taken by Hon'ble Gujarat High Court in Neha Builder (supra). Sub-section (5) in section 23 was inserted by finance Act 2017 w.e.f. 01.04.2018; therefore, the same is not applicable for the assessment year under consideration.

10. The Id AR for the assessee strongly relied on the decision of Mumbai Tribunal in Runawal Constructions & Runawal Builders Pvt Ltd (supra), wherein the coordinate bench of Tribunal held as under;

“7. We have heard the rival submissions and perused the orders of the authorities below and the decisions relied upon. It is an undisputed fact that the assessee's are in the business of builders, developers and construction. Both the assessee's have constructed various projects and the projects were treated as stock in trade in the books of account. Flats sold by the assessee's were assessed under the head 'income from business'. There were certain unsold flats in stock in trade which the AO treated as property assessable under the head 'income from house property' and computed notional annual letting value on such unsold flats placing reliance on the decision in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra). The action of the AO was upheld by the learned CIT(A).

8. The Hon'ble Gujarat High Court in the case of Neha Builders Pvt. Ltd. (supra) considered the question whether the rental income received from any property in the construction business can be claimed under the head 'income from property' even though the said property was included in the closing stock. The Hon'ble Gujarat High Court held that if the business of the assessee is to construct the property and sell it or to construct and let out the same, then that would be the business and the business stocks, which may include movable and immovable, would be taken to be stock in trade and any income derived from such stocks cannot be termed as income from house property. While holding so the Hon'ble High Court observed as under: -

"8. True it is, that income derived from the property would always be termed as 'income' from the property, but if the property is used as 'stock-in-trade', then the said property would become or partake the character of the stock, and any income derived from the stock, would be 'income' from the business, and not income from the property. If the business of the assessee is to construct the property and sell it or to construct and let out the same, then that would be the 'business' and the

business stocks, which may include movable and immovable, would be taken to be 'stock-in-trade', and any income derived from such stocks cannot be termed as 'income from property'. Even otherwise, it is to be seen that there was distinction between the 'income from business' and 'income from property' on one side, and 'any income from other sources'. The Tribunal, in our considered opinion, was absolutely unjustified in comparing the rental income with the dividend income on the shares or interest income on the deposits. Even otherwise, this question was not raised before the subordinate Tribunals and, all of sudden, the Tribunal started applying the analogy.

9. From the statement of the assessee, it would clearly appear that it was treating the property as 'stock-in-trade'. Not only this, it will also be clear from the records that, except for the ground floor, which has been let out by the assessee, all other portions of the property constructed have been sold out. If that be so, the property, right from the beginning was a 'stock-in-trade'."

9. Similarly the Coordinate Bench has considered similar issue as to whether the unsold property which is held as stock in trade by the assessee can be assessed under the head 'income from house property' by notionally computing the annual letting value from such property and the Coordinate Bench considering the decision of the Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd. (supra) which the AO relied upon and the decision of the Hon'ble Supreme Court in the case of [Chennai Properties & Investments Ltd. vs. CIT](#) reported in 373 ITR 673, held that unsold flats which are in stock in trade should be assessed under the head 'business income' and there is no justification in estimating rental income from those flats and notionally computing annual letting value under [Section 23](#) of the Act. While holding so the Coordinate Bench observed as under: -

"3. The Id. AR placed the order of Bombay Tribunal in the case of M/s Perfect Scale Company Pvt. Ltd., ITA Nos.3228 to 3234/Mum/2013, order dated 6-9-2013, wherein it was held that in respect of assets Runwal Constructions & Runwal Builders held as business, income from the same is not assessable u/s.23(1) of the [IT Act](#).

4. On the other hand, Id. DR relied on the order of Hon'ble Delhi High Court in the case of Ansal Housing Finance & Leasing Co. Ltd., 354 ITR 180 (Delhi) in support of the proposition that even in respect of unsold flats by the developer is liable to be taxed as income from house property.

5. We have considered rival contentions and perused the record. The issue under consideration has been restored by the CIT(A) to the file of AO to compute the annual value. Recently the Hon'ble Supreme Court in the case of M/s Chennai Properties & Investments Ltd. Vs. CIT, reported in (2015) 42 SCD 651, vide judgment dated 9-4-2015 has held that where assessee company engaged in the activity of letting out properties and the rental income received was shown as business income, the action of AO treating the rental income as income from house property in place of income from business shown by the assessee was held to be not justified. The Hon'ble Supreme Court held that since the assessee company's main object, is to acquire and held properties and to let out these properties, the income earned by letting out these properties is main objective of the company, therefore, rent received from the letting out of the properties is assessable as income from business. On the very same analogy in the instant case, assessee is engaged in business of construction and development, which is main object of the assessee company. The three flats which could not be sold at the end of the year was shown as stock-in-trade. Estimating rental income by the AO for these three flats as income from house property was not justified insofar as these flats were neither given on rent nor the assessee has intention to earn rent by letting out the flats. The flats not sold was its stock-in-trade and income arising on its sale is liable to be taxed as business income. Accordingly, we do not find any justification in the order of AO for estimating rental income from these vacant flats u/s.23 which is assessee's stock in trade as at the end of the year. Accordingly, the AO is directed to delete the addition made by estimating letting value of the flats u/s.23 of the I.T.Act."

10. In the case on hand before us it is an undisputed fact that both assessee's have treated the unsold flats as stock in trade in the books of account and the flats sold by them were assessed under the head 'income from business'. Thus, respectfully following the above said decisions we hold that the unsold flats which are stock in trade when they were sold they are assessable under the head 'income from business' when they are sold and therefore the AO is not correct in bringing to tax

notional annual letting value in respect of those unsold flats under the head 'income from Runwal Constructions & Runwal Builders house property'. Thus, we direct the AO to delete the addition made under [Section 23](#) of the Act as income from house property.

11. Further, by following the decision of Runwal Constructions & Runwal Builders (supra), identical relief was granted in Arihant Estate Pvt Ltd (supra). Coming to the facts of the present case, when the facts are not at variance as the assessee has shown the unsold unit as opening stock.

12. Therefore, respectfully following the decisions of coordinate bench and the decisions of Gujarat High Court in Neha Builders (supra) we are of the view that the Assessing Officer was not justified in bringing the unsold flat to bring it under income from house property. The submission of the ld DR that the legislature has already brought the amendment in section 23(5) of the Act to bring the unsold unit after a vacancy period of one year is not acceptable to us as the said amendment was brought by Finance Act, 2017 and is applicable from 01.04.2018, thus, the said amendment is not applicable for the year under consideration.

13. Considering the fact that the amendment inserted in section 23(5) is applicable w.e.f. 01-04-2018 and is not applicable for the year under consideration and in view of the aforesaid discussion and on the basis of decision of co-ordinate bench of this Tribunal, we are of the view that the AO was not justified in computing the ALV of unsold units and bringing

the same under the head “Income from house property”. In the result, ground 1 of the appeal is allowed.

14. Ground 2 is consequential in nature; the AO is directed to recompute the interest u/s 234B in accordance with law.
15. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 06-01-2020.

Sd/-

Sd/-

(Shamim Yahya)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 6th January, 2020

Pk/-

Copy to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai